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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 LARRY GLENN MALLORY,
12 Inmate Booking No. 1257706,

13 Plaintiff,

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15 vs.
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18 SHERIFF WILLIAM D. GORE; JIM
19 MADSEN, Captain; ZACHARY
20 YARLING, Deputy; COUNTY OF SAN
21 DIEGO; SAN DIEGO COUNTY
22 ATTORNEY,
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24 Defendants.
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Civil No. 13cv0275 IEG (DHB)

ORDER:

**(1) GRANTING PLAINTIFF'S
MOTION TO PROCEED *IN
FORMA PAUPERIS*, IMPOSING
NO PARTIAL FILING FEE AND
GARNISHING \$ 350 BALANCE
FROM PRISONER'S TRUST
ACCOUNT PURSUANT
TO 28 U.S.C. § 1915(a)
[ECF No. 8];**

**(2) DISMISSING COMPLAINT FOR
FAILING TO STATE A CLAIM
PURSUANT TO 28 U.S.C.
§§ 1915(e)(2)(B) & 1915A(b)**

Larry Glenn Mallory ("Plaintiff"), an inmate currently incarcerated at the George Bailey Detention Facility located in San Diego, California, and proceeding in pro se, has filed this civil rights action pursuant to 42 U.S.C. § 1983 Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead he has filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) [ECF No. 8].

I.

MOTION TO PROCEED IFP

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners granted leave to proceed IFP remain obligated to pay the entire fee in installments, regardless of whether their action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act ("PLRA"), a prisoner seeking leave to proceed IFP must submit a "certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the six-month period immediately preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account statement, the Court must assess an initial payment of 20% of (a) the average monthly deposits in the account for the past six months, or (b) the average monthly balance in the account for the past six months, whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the prisoner must collect subsequent payments, assessed at 20% of the preceding month's income, in any month in which the prisoner's account exceeds \$10, and forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

The Court finds that Plaintiff has no available funds from which to pay filing fees at this time. *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing a civil action or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee."); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve" preventing dismissal of a prisoner's IFP case based solely on a "failure to pay ... due to the lack of funds

1 available to him when payment is ordered.”). Therefore, the Court **GRANTS** Plaintiff’s Motion
 2 to Proceed IFP [ECF No. 8] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1).
 3 However, the entire \$350 balance of the filing fees mandated shall be collected and forwarded
 4 to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.
 5 § 1915(b)(1).

6 **III.**

7 **SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

8 The PLRA also obligates the Court to review complaints filed by all persons proceeding
 9 IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused
 10 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
 11 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as
 12 practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
 13 provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions thereof,
 14 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who
 15 are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-
 16 27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000)
 17 (§ 1915A); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing
 18 § 1915A).

19 “[W]hen determining whether a complaint states a claim, a court must accept as true all
 20 allegations of material fact and must construe those facts in the light most favorable to the
 21 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
 22 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s
 23 duty to liberally construe a pro se’s pleadings, *see Karim-Panahi v. Los Angeles Police Dept.*,
 24 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v.*
 25 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). However, in giving liberal interpretation to a
 26 pro se civil rights complaint, the court may not “supply essential elements of claims that were
 27 not initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th
 28 Cir. 1982). “Vague and conclusory allegations of official participation in civil rights violations

are not sufficient to withstand a motion to dismiss.” *Id.*

A. 42 U.S.C. § 1983 Liability

Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person acting under color of state law committed the conduct at issue, and (2) that the conduct deprived the claimant of some right, privilege, or immunity protected by the Constitution or laws of the United States. *See* 42 U.S.C. § 1983; *Nelson v. Campbell*, 541 U.S. 637, 124 S. Ct. 2117, 2122 (2004); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

B. Eighth Amendment claims

Plaintiff claims that his Eighth Amendment rights have been violated due to overcrowding at George Bailey Detention Facility. Plaintiff’s Complaint speaks of his conditions of confinement in general terms and rarely provides any specific factual allegation pertaining to Plaintiff as an individual. Allegations of overcrowding, without additional facts, are insufficient to state a claim under the Eighth Amendment. *See Rhodes v. Chapman*, 452 U.S. 337, 348 (1981). “[S]ubjection of a prisoner to lack of sanitation that is severe or prolonged can constitute an infliction of pain within the meaning of the Eighth Amendment.” *Anderson v. County of Kern*, 45 F.3d 1310, 1314 (9th Cir. 1995). Conditions of confinement, consistent with the Constitution, can be restrictive and harsh. *Rhodes*, 452 U.S. at 337.

C. Respondeat Superior claims

Plaintiff names Sheriff Gore in this matter but fails to set forth any specific factual allegations with regard to this Defendant in the body of Plaintiff’s Complaint. Thus, it appears that Plaintiff seeks to hold this Defendant liable in his supervisory capacity. However, there is no respondeat superior liability under 42 U.S.C. § 1983. *Palmer v. Sanderson*, 9 F.3d 1433, 1437-38 (9th Cir. 1993). Instead, “[t]he inquiry into causation must be individualized and focus on the duties and responsibilities of each individual defendant whose acts or omissions are alleged to have caused a constitutional deprivation.” *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (citing *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976)). In order to avoid the respondeat superior bar, Plaintiff must allege personal acts by each individual Defendant which have a direct causal connection to the constitutional violation at issue. *See Taylor v. List*, 880

1 F.2d 1040, 1045 (9th Cir. 1989).

2 Supervisory prison officials may only be held liable for the allegedly unconstitutional
3 violations of a subordinate if Plaintiff sets forth allegations which show: (1) how or to what
4 extent they personally participated in or directed a subordinate's actions, and (2) in either acting
5 or failing to act, they were an actual and proximate cause of the deprivation of Plaintiff's
6 constitutional rights. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). As currently pleaded,
7 however, Plaintiff's Complaint fails to set forth facts which might be liberally construed to
8 support an individualized constitutional claim against Defendant Gore.

9 **D. Fourteenth Amendment**

10 Plaintiff also alleges that Defendant Madsen failed to properly process and investigate
11 his grievances. (*See* Compl. at 4.) The Fourteenth Amendment provides that: "[n]o state shall
12 ... deprive any person of life, liberty, or property, without due process of law." U.S. CONST.
13 amend. XIV, § 1. "The requirements of procedural due process apply only to the deprivation of
14 interests encompassed by the Fourteenth Amendment's protection of liberty and property."
15 *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). State statutes and prison regulations may
16 grant prisoners liberty or property interests sufficient to invoke due process protection.
17 *Meachum v. Fano*, 427 U.S. 215, 223-27 (1976). To state a procedural due process claim,
18 Plaintiff must allege: "(1) a liberty or property interest protected by the Constitution; (2) a
19 deprivation of the interest by the government; [and] (3) lack of process." *Wright v. Riveland*,
20 219 F.3d 905, 913 (9th Cir. 2000).

21 However, the Ninth Circuit has held that prisoners have no protected *property* interest in
22 an inmate grievance procedure arising directly from the Due Process Clause. *See Ramirez v.*
23 *Galaza*, 334 F.3d 850, 869 (9th Cir. 2003) ("[I]nmates lack a separate constitutional entitlement
24 to a specific prison grievance procedure") (citing *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir.
25 1988) (finding that the due process clause of the Fourteenth Amendment creates "no legitimate
26 claim of entitlement to a [prison] grievance procedure")); *accord Adams v. Rice*, 40 F.3d 72, 75
27 (4th Cir. 1994) (1995); *Buckley v. Barlow*, 997 F.2d 494, 495 (8th Cir. 1993).

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1 In addition, Plaintiff has failed to plead facts sufficient to show that prison official
 2 deprived him of a protected *liberty* interest by allegedly failing to respond to his prison
 3 grievances in a satisfactory manner. While a liberty interest can arise from state law or prison
 4 regulations, *Meachum*, 427 U.S. at 223-27, due process protections are implicated only if
 5 Plaintiff alleges facts to show that Defendants: (1) restrained his freedom in a manner not
 6 expected from his sentence, and (2) “impose[d] atypical and significant hardship on [him] in
 7 relation to the ordinary incidents of prison life.” *Sandin v. Conner*, 515 U.S. 472, 484 (1995);
 8 *Neal v. Shimoda*, 131 F.3d 818, 827-28 (9th Cir. 1997). Plaintiff pleads nothing to suggest how
 9 the allegedly inadequate review and consideration of his inmate grievances resulted in an
 10 “atypical” and “significant hardship.” *Sandin*, 515 U.S. at 483-84. Thus, to the extent Plaintiff
 11 challenges the procedural adequacy of inmate grievance procedures, his Complaint fails to state
 12 a due process claim.

13 **E. Monell claims**

14 Plaintiff also names the County of San Diego as a Defendant. “[A] municipality cannot
 15 be held liable solely because it employs a tortfeasor – or, in other words, a municipality cannot
 16 be held liable under § 1983 on a respondeat superior theory.” *Monell v. Department of Social*
 17 *Services*, 436 U.S. 658, 691 (1978). A municipality may be liable under § 1983 for monetary,
 18 declaratory, or injunctive relief where the constitutional deprivation was caused by the
 19 implementation or execution of “a policy statement, ordinance, regulation, or decision officially
 20 adopted and promulgated by that body’s officers.” *Monell*, 436 U.S. at 690; *Board of the County*
 21 *Commissioners v. Brown*, 520 U.S. 397, 117 S. Ct. 1382, 1388 (1997); *Navarro v. Block*, 72 F.3d
 22 712, 714 (9th Cir. 1995).

23 To establish municipal liability, plaintiff must show: (1) he was deprived of a
 24 constitutional right; (2) the city had a policy; (3) the policy amounted to deliberate indifference
 25 to plaintiff’s constitutional right; and (4) the policy was the “moving force behind the
 26 constitutional violation.” *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996); *see*
 27 *Board of the County Commissioners v. Brown*, 520 U.S. 397, 117 S. Ct. at 1388; *Trevino v.*
 28 *Gates*, 99 F.3d 911, 918 (9th Cir. 1996). Thus, in order to state a § 1983 claim against the City

1 or County of San Diego, Plaintiff must allege facts showing that his injury was caused by
 2 individual officers whose conduct conformed to an official city policy, custom or practice. *See*
 3 *Karim-Panahi*, 839 F.2d at 624.

4 Accordingly, the Court finds that Plaintiff's Complaint fails to state a section 1983 claim
 5 upon which relief may be granted, and is therefore subject to dismissal pursuant to 28 U.S.C.
 6 §§ 1915(e)(2)(b) & 1915A(b). The Court will provide Plaintiff with an opportunity to amend
 7 his pleading to cure the defects set forth above. Plaintiff is warned that if his amended complaint
 8 fails to address the deficiencies of pleading noted above, it may be dismissed with prejudice and
 9 without leave to amend.

10 III.

11 CONCLUSION AND ORDER

12 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

13 1. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [ECF No. 8] is
 14 **GRANTED**.

15 2. The Watch Commander for George Bailey Detention Facility, or his designee, shall
 16 collect from Plaintiff's prison trust account the \$350 balance of the filing fee owed in this case
 17 by collecting monthly payments from the account in an amount equal to twenty percent (20%)
 18 of the preceding month's income and forward payments to the Clerk of the Court each time the
 19 amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). **ALL**
 20 **PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**
 21 **ASSIGNED TO THIS ACTION.**

22 3. The Clerk of the Court is directed to serve a copy of this Order on Watch
 23 Commander, George Bailey Detention Facility, 446 Alta Road, Suite 5300, San Diego,
 24 California 92158.

25 **IT IS FURTHER ORDERED** that:


26 4. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C.
 27 §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave
 28 from the date this Order is "Filed" in which to file a First Amended Complaint which cures all

1 the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in
2 itself without reference to the superseded pleading. *See* S.D. Cal. Civ. L. R. 15.1. Defendants
3 not named and all claims not re-alleged in the Amended Complaint will be deemed to have been
4 waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if Plaintiff's Amended
5 Complaint fails to state a claim upon which relief may be granted, it may be dismissed without
6 further leave to amend and may hereafter be counted as a "strike" under 28 U.S.C. § 1915(g).
7 *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

8 5. The Clerk of Court is directed to mail a form § 1983 complaint to Plaintiff.

9 **IT IS SO ORDERED.**

10 DATED: April 2, 2013

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12 HON. IRMA E. GONZALEZ
13 United States District Judge
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